

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-1399

To be argued by
DAVID J. GOTTLIEB

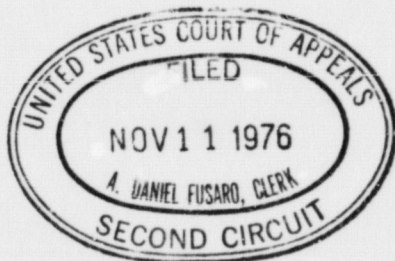
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
ERIC ELWOOD MOORE,
Defendant-Appellant.

Docket No. 76-1399

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUGHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
ERIC ELWOOD MOORE
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

DAVID J. GOTTLIEB,
Of Counsel.

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BRIEF FOR APPELLANT

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ON APPEAL FROM A JUDGMENT
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FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the Government failed to prove that appellant's statements were willful expressions of a serious intention to inflict bodily harm.

2. Whether the statutory elements of willfulness and knowledge require proof of intent to injure the President, to incite others to do so, or to disrupt Presidential activity.

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (Werker, J.), entered August 24, 1976, convicting appellant of willfully and knowingly threatening the life of the President of the United States in violation of 18 U.S.C. §871(a) and sentencing him to two years' imprisonment with execution of sentence suspended and appellant placed on probation with special conditions.

This Court continued the Legal Aid Society, Federal Defender Services Unit as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

The indictment charged appellant Eric Elwood Moore with violating 18 U.S.C. §871(a). It was alleged that on October 4, 1975, while in the custody of the Secret Service, appellant knowingly and willfully uttered a threat to the life of the President to a Secret Service Agent, one William L. Kehoe. A hearing on a motion to suppress physical evidence was held on May 24, and June 2, 1976. The testimony of this hearing was eventually admitted by stipulation into evidence at trial (Tr. 3-4¹.) On July 7, 1976, appellant waived a jury trial, and a non-jury trial was held before the Honorable Henry F. Werker. Following Officer Kehoe's testimony, and counsels' summations, the Court found appellant guilty of violating §871(a). On August 24, 1976, appellant was sentenced to two years' imprisonment, with execution of sentence suspended and appellant placed on probation with special conditions.

¹Numbers preceded by "Tr." refer to pages of the trial transcript, dated July 7, 1976. Numbers preceded by "H" refer to pages of the suppression hearing transcript admitted into evidence at trial.

The Trial Evidence

Appellant came to the attention of law enforcement officers as a result of a traffic stop conducted by a Westchester County Park Police Patrolman, Michael Palumbo. Sometime between 10:30 and 11:15 PM on the night of October 3, 1975, Officer Palumbo stopped a car driven by appellant, with two passengers, one male and one female, inside, to check on a number of vehicle violations (H. 8, 14, 19²). The officer asked appellant for his license and registration, neither of which appellant was able to produce (H. 8-9). After two checks with the police radio, which showed that there were no warrants outstanding against appellant, the officer informed appellant he was under arrest for driving without a license and for an improperly maintained exhaust system, and gave him his Miranda Warnings (H. 9-11, 38).

Appellant completely broke down, cried and told the officer that he just wanted to see his mother (H. 24). He stated that he "might as well tell the police now" that there was a warrant

²Officer Palumbo stated that the automobile had one tail light out of order, no rear license plate and was making a "loud noise" from the exhaust system (H. 8).

for his arrest in San Francisco and Colorado; that he was a member of underground groups such as S.D.S. and a black "gay" organization; that he was involved in a bombing at Logan Airport in Boston; that he was a carrier of weapons for various organizations that he used to believe in, but now he wanted to come to his senses, make everything O.K. and see his mother. As he continued crying, appellant stated he wanted to kill the President of the United States since "[t]his was the opinion of the number of groups he had been related with. He had nothing against the man, he said, but this is what he was going to do if he had to do it."³ (H. 11-13)

Appellant also admitted that he had previously been involved with narcotics, and a later inventory search of the car disclosed a small plastic bag containing what appellant claimed was heroin (H. 13). Subsequent discussion revealed that the passengers in appellant's car were riders appellant had picked up earlier that day in Boston whom appellant had agreed to trans-

³ Later in his testimony, Palumbo alleged that appellant had stated that he wanted to kill the President; appellant also alleged that when he was out West or in California he had his own handgun and that it was that handgun, rather than the weapons he had carried for various radical groups, appellant was going to use to assassinate the President.

port as far as his destination, his mother's home in North Carolina (H. 36). Appellant also stated that he had previously been hospitalized in Bellevue (H. 33). Officer Palumbo related appellant's confession, in general terms, to his superiors. However, he apparently did not inform them of appellant's statements concerning the President (H. 76). Moreover, there is no evidence that the police, having found no outstanding warrants, regarded appellant's ravings sufficiently credible to institute any investigation concerning his other threats or admissions.

Appellant was transferred to the Hawthorne Police Station where, later that night, he was interrogated by Charles Rice, a state police detective. Rice questioned appellant for a while, but appellant appeared tired and his answers were unresponsive (H. 69-71⁴.)

The following morning Rice returned to duty and resumed his discussions with appellant. Rice asked appellant where he had been headed in his car, and appellant answered, unresponsively, that he was depressed about the "work situation" and that he blamed the President for that condition. Appellant stated that he would continue travelling around the country to try and kill the President. From the front seat of appellant's vehicle, Rice

⁴That evening Rice searched appellant's automobile, recovering a woman's dress, wig, and several pair of false eyelashes from one bag. (H. 72).

obtained a map with various locations marked which appellant said indicated his itinerary. Significantly, the President was nowhere near any of the locations marked on the map (H. 73-74). Appellant also informed Rice that he was formerly a patient in a mental hospital (H. 82). After hearing appellant's statement, Rice called Secret Service agent Keogh, informing him of appellant's statement, his narcotics addiction, and the initial reason for his arrest (H. 42, 46, 50, 77).

Keogh arrived at 10:30 AM and proceeded to interview appellant. Appellant was unshaven, sloppily dressed, and may not have had anything to eat or drink since the previous night (H. 55). Keogh advised appellant of his Constitutional rights and then "asked appellant about what statements he had made" (H. 57)⁵. Keogh said he had heard that appellant "had expressed some interest in President Ford" (H. 43-44).

Appellant's responses to Keogh's questions are the statements that became the basis for the indictment. At the

⁵Keogh was not entirely certain that he had told appellant that it was against the law to threaten the President.

⁶(H. 57).

suppression hearing, Keogh related the statements:

He told me he had been following the President through the country and had been planning to assassinate the President.

(H. 44).

Keogh also stated that appellant repeated that he had been involved in various organizations and had committed various crimes throughout the United States (H. 48).

At trial Keogh elaborated on appellant's statements, as follows:

A Mr. Moore told me that he was planning to assassinate the President of the United States, that he had been following him throughout the country, and that he planned to purchase a Saturday night special and assassinate President Ford.

Q Did he explain any plans for effectuating that assassination?

A Yes. He told me that he had a woman's wig, eyelashes and a dress which he was going to wear as a disguise and hopefully use the disguise to assassinate the President.

Q What was he going to do with this disguise, if anything, after the assassination?

A He stated he was going to take it off and hope that that would aid his escape.

Q Did he indicate any feelings about his success in escaping?

A He told me he was not concerned with the consequences of his act and did not care if he escaped or not.

Q What did he tell you he would do if he were not arrested by your agency or if he were released on bail?

A He stated if he had been released or not arrested he would hurry up and assassinate the President.

Q By the way, did the subject of former President Nixon come up during this conversation?

A Yes. Mr. Moore told me he thought of killing Mr. Nixon but didn't think it was worth it.

(Tr. 5-6⁶).

Keogh also stated that earlier appellant had admitted that he had expressed his intention to kill Ford to a gasoline station attendant (H. 63); and that appellant had formerly been a mental patient (H. 47).

Keogh was apparently unaware, however, of all of appellant's original confessions to officer Palumbo, and he did not know of appellant's untrue claim of, for example, the bombing of Logan airport (Tr. 13-17).

Two days later, appellant made other statements (admitted at trial as subsequent similar acts) that he was planning to assassinate President Ford to Agent Keogh and to an Assistant United States Attorney (Tr. 8-9).

⁶The Government, over defense objection introduced into evidence eyelashes and a wig allegedly found in appellant's car (Tr. 7). Keogh admitted, however, that he had made no effort to ascertain whether the lashes belonged to appellant or to the female passenger with whom appellant had been riding.

Following Keogh's testimony the Government rested (Tr. 27). In summation, the defense argued for a judgment of acquittal, inter alia , on the ground that appellant's October 4 statements to Keogh, the basis of the indictment, were confessions of his previous intent rather than true threats (Tr. 28-30). The court found that appellant's statements to Keogh were not confessional and convicted him of violating §871 (Tr. 48-49)⁷. This appeal followed.

⁷The Court's decision is reproduced as "C" in appellant's separate appendix.

ARGUMENT

POINT I

THE GOVERNMENT FAILED TO PROVE THAT APPELLANT'S STATEMENTS WERE WILLFUL EXPRESSIONS OF A SERIOUS INTENTION TO INFLICT BODILY HARM AND APPELLANT SHOULD THEREFORE HAVE BEEN ACQUITTED.

18 U.S.C. §871(a) requires that a threat to the life of a President be made "knowingly and willfully" in order to support a conviction. This court has adopted a stringent "objective" construction of the statute, which permits a conviction of threatening the President without proof that a defendant intended to carry out his threat. However, even under this standard, it must be shown that the words used would be understood by others as a threat before a conviction is authorized.

In United States v. Compton, 428 F.2d 18 (2d Cir. 1970), cert. denied, 401 U.S. 1014 (1971), this court adopted the following definition of willfulness and knowledge from Roy v. United States, 416 F.2d 874, 877-878 (9th Cir. 1968):

... the willfulness requirement of the statute requires only that the defendant intentionally make a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of the President, and that the statement not be the result of mistake, duress or coercion.

416 F.2d at 877-878, quoted with approval in Compton, supra, 428 F.2d at 21.

See also, United States v. Rogers, 488 F.2d 512 (5th Cir. 1974), rev'd on other grounds, 422 U.S. 35 (1975); United States v. Lincoln, 462 F.2d 1368 (6th Cir.), cert. denied, 409 U.S. 952 (1972); United States v. Hart, 457 F.2d 1087 (10th Cir.), cert. denied, 409 U.S. 861 (1972); Watts v. United States, 420 F.2d 676 (1968), rev'd on other grounds, 394 U.S. 705 (1969).

Here, the record is devoid of evidence which would permit a reasonable person to find that appellant's ravings evinced a serious intention to injure the President. In fact, when read in context, appellant's statements cannot be called threats of any kind, since they were, at most, no more than confessions of past threats. The record shows that appellant's responses to officer Keogh occurred only after Keogh had posed the following questions:

I asked appellant about what statements he had made (H. 57).

I heard that he had expressed some interest in President Ford (H. 44).

Those statements were clearly a request for appellant to repeat past statements. His response, we submit, was no more than a confession to past threats rather than a statement of present intention. Indeed, at the suppression hearing, Keogh testified that appellant's response to him was phrased exclusively in the past tense:

He told me he had been following the President through the country and had been planning to assassinate the President.

(H. 44)

And, while Keogh elaborated on this statement at trial to include a more detailed description in present tense, of appellant's plans, the statements were still uttered in response to Keogh's original requests about what appellant "had" said, and they still constituted, at best, a recapitulation of appellant's earlier statements rather than a separate crime.

Moreover, even if the statements are not considered confessional they were utterly insufficient, in their context, to establish a serious intention to injure the President. Indeed, the very policemen to whom appellant uttered his statements found them to be totally incredible. Appellant's earliest statements to officer Palumbo that there were warrants outstanding against him was verified by Palumbo to be untrue, and his subsequent ravings concerning Black gay organizations and the bombing of Logan Airport were so ludicrous Palumbo apparently did not relay them at all to the Secret Service. The obviously incredible nature of appellant's statements was apparently also evident to officer Rice. When appellant told the officer he was travelling around with the purpose of killing the President he displayed a map with his itinerary marked. Yet, as the Secret Service pointed out to Rice, the President was not near any of the locations marked out by the map. Finally, appellant's custodial statement to Keogh, the basis of the indictment here, were also uttered under circumstances demonstrating that the police were fully aware that appellant's statements were utterly incredible. Appellant stated he had been following the President,

the Secret Service knew that was not so. Appellant stated he was in the process of assassinating a President; the police knew that appellant's car had been searched and no gun found; appellant proclaimed his association with radical groups; Keogh, for aught the record appears, did not bother to investigate. Finally, of course, appellant, a former mental patient, was in custody during these statements; thus the officers knew his scheme could never be executed.

Thus, this case is totally distinguishable from Roy v. United States, supra; and United States v. Compton. In Roy, the defendant,

... made a telephone call threatening the life of the President. The telephone operator knew that the telephone call came from Camp Pendleton, where Marines were stationed with access to weapons and ammunition. The President was due to arrive in a few hours and might review or address the troops as Commander in Chief of the Armed Forces.

416 F.2d at 878.

Thus, the telephone operator certainly could only believe that Roy had the "apparent determination" to carry out the threats. Compton is also factually similar. There, Compton telephoned the New York Police Department emergency number and advised the police he intended to assassinate the President with a .38 automatic. As one might expect, the call was not ignored and the police were sent to arrest the culprit. Moreover, it transpired that Compton had previously been seen at the Waldorf Astoria one floor below the then President-elect Nixon. 428 F.2d at 20.

Again, a finding of "apparent determination" was almost inescapable. See, United State v. Hart, supra, 457 F.2d 1087 (anonymous call to Secret Service; description of detailed plan to agents including accurate description of interior of the White House).

Here, there was no proximity between appellant and the President, and appellant was proved to be incredible. Since the record shows that appellant was not and could not be perceived to have the apparent determination to inflict bodily harm, the judgment of conviction must be reversed.

POINT II

THE STATUTORY ELEMENTS OF WILLFULNESS AND KNOWLEDGE REQUIRE PROOF OF INTENT TO INJURE THE PRESIDENT, TO INCITE OTHERS TO DO SO, OR TO DISRUPT PRESIDENTIAL ACTIVITY.

In United States v. Compton, 428 F.2d 18 (2d Cir. 1970), cert. denied, 401 U.S. 1014 (1971), this court adopted an objective construction of the elements of knowledge and willfulness in §371 originally enunciated in Ragansky v. United States, 253 F. 643 (7th Cir. 1918). This construction supports the conviction of anyone making a statement which would reasonably be understood as a threat, as long as the defendant intended to make the statement and knew the meaning of the words used. 428 F.2d at 21. This test, which does not even require that the defendant have intended his statement to be a threat, let alone that he have intended to carry it out, has been adopted by a number of other courts. See United States v. Lincoln, 462 F.2d 1368 (6th Cir.), cert. denied, 409 U.S. 952 (1972); United States v. Hart, 457 F.2d 1087 (10th Cir.) cert. denied, 409 U.S. 861 (1972); Roy v. United States, 416 F.2d 874 (9th Cir. 1969); Watts v. United States, 402 F.2d 676 (1968), rev'd on other grounds, 394 U.S. 705 (1969). That standard, however, was rejected by the Fourth Circuit in United States v. Patillo, 431 F.2d 293, (4th Cir. 1970), affirmed en banc, 438 F.2d 13 (1971), which required a showing of intent upon the part of the speaker to incite, to carry out his threats, or at least to disrupt Presidential activity. Because, we respect-

fully submit, Patillo represents a view of the statute most in accord with its purposes and Legislative history, we respectfully urge this court to reexamine its decision in Compton⁸.

18 U.S.C. §871 has been interpreted to have encompassed three basic interests: (1) to protect the President from physical harm from a person making a threat, (2) to protect from a listener incited by an utterer and (3) to protect against harrassment against the President in the performance of his duties. Note, Threatening the President, 57 Geo. L.J. 553, 558 (1969); see Watts v. United States, 394 U.S. 705, 707 (1969); 53 Cong Rec 9377-9378 (1916). Thus, to accomplish the purposes of the statute, it would be unreasonable for the Government to be required to show, in every case, that a defendant intended to carry out his threat. For if a defendant willfully uttered a threat, with knowledge that it would disrupt Presidential activity but with no intent to carry out the threat, the basic purposes of the statute would still be implicated. Thus, the cases have correctly rejected the view that an intent to harm the President is an essential prerequisite to a conviction. United States v. Compton, supra; Roy v. United States,

⁸This issue has twice been avoided by the Supreme Court. Watts v. United States, 394 U.S. 705 (1969); Rogers v. United States, 422 U.S. 35 (1975).

supra. However, we submit that result should not mean that no proof at all of the defendant's culpable intent is required. Simply put, the Legislative history and the words of statute themselves still require a showing of willfulness and culpability on the part of the defendant.

Thus, in the House debates, when an amendment, ultimately unsuccessful, to eliminate the willfulness requirement of §371 was offered, the following objection was raised:

[I]f this statute is to be saved at all, it seems to me it must be upon the theory that the act is willful. There is not anything in the language outside of that word to convey the idea that the threat must be an intentional threat against the president. The word "willful" conveys, as ordinarily used, the idea of wrongful as well as intentional. That idea ought to be preserved so as not to make innocent acts punishable.

53 Cong. Rec. 9379 (1916).

The only other Congressman to comment on the issue on the House floor stated "I do not think we ought to be too anxious to convict a man who does a thing thoughtlessly." Id., at 9378. The legislative history thus shows that the bill was intended to require a showing that the defendant appreciated the threatening nature of his statements and that he was aware that the threat was a serious one. Rogers v. United States, 422 U.S. 35, 47 (Marshall, J., concurring).

Thus, we submit that the proper standard for judging the willfulness requirement, in accord with the basic purpose of

§371, was stated in Patillo:

We agree with [Compton and Roy] that the statute was designed to prevent a secondary evil other than actual assaults upon the President or incitement to assault the President, and that it is a legitimate area of congressional concern to prevent and make criminal disruptions of Presidential activity and movement that may result simply from publication of an apparent threat upon the President's life. When a threat is published with an intent to disrupt Presidential activity, we think there is sufficient means mens rea under the secondary sanction of the statute.

438 F.2d at 15-16.

Here, there is not a shred of evidence showing appellant's actual intent to carry out his threat, and no evidence that he intended to disrupt Presidential activity. Accordingly, his conviction should be reversed and the indictment dismissed.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed and the indictment dismissed.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
ERIC ELWOOD MOORE
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

DAVID J. GOTTLIEB,
Of Counsel.

November 11, 1976.